Asean Security Paper Mills Sdn Bhd v Provincial Insurance (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-2458 OF 1989
ABDUL HAMID MOHAMAD J
11 FEBRUARY 2000

Civil Procedure *— Costs — Security for costs — Application for — Whether defendant must obtain leave of court before filing application for security for costs — Whether defendant prevented from defending itself in suit brought by wound-up company — Companies Act 1965 s 226(3)*

Companies and Corporations *— Winding up — Security for costs — Application for — Whether defendant must obtain leave of court before filing application for security for costs — Whether defendant prevented from defending itself in suit brought by wound-up company — Companies Act 1965 s 226(3)*

The defendant applied for the plaintiff to provide security for cost on the ground that the plaintiff had been wound up. The senior assistant registrar dismissed the application. The defendant appealed. The issue before the court was whether the defendant must obtain leave of court first before filing the application in view of the provision of s 226(3) of the Companies Act 1965.

Held, allowing the appeal:

Section 226(3) seeks to prevent a party commencing an originating process against the company after it has been wound up or provisional liquidator has been appointed without leave of court. It is not to prevent a party from defending itself in a suit brought by the company against it. A defendant making an interlocutory application in the process of defending itself should and does not become a plaintiff or the initiator of the suit. The defendant in defending itself incurs costs, which in this case would certainly be quite substantive, what more when the defence was fraud on the part of the plaintiff. Yet, if it succeeds, it is very unlikely that the defendant will ever recover its cost (see p 441D–G).

[Bahasa Malaysia summary

Defendan telah memohon agar plaintif memperuntukkan jaminan untuk kos atas dasar bahawa plaintif telah digulung. Penolong kanan pendaftar telah menolak permohonan tersebut. Defendan telah merayu. Isu di hadapan mahkamah adalah sama ada defendan mesti mendapat kebenaran dahulu sebelum memfailkan permohonan memandangkan peruntukan s 226(3) Akta Syarikat 1965.

Diputuskan, membenarkan rayuan tersebut:

Seksyen 226(3) menghalang suatu pihak daripada memulakan suatu proses permulaan terhadap syarikat selepas ia digulungkan atau

penyelesai sementara telah dilantik tanpa kebenaran mahkamah. Ia bukanlah untuk menghalang suatu pihak daripada membela diri di dalam guaman yang dibawa oleh syarikat terhadapnya. Defendan yang membuat permohonan interlokutori di dalam proses membela diri tidak menjadi seorang plaintif atau pembawa guaman. Defendan di dalam membela dirinya sendiri telah mengalami kos, di mana di dalam kes ini adalah agak besar, lebih-lebih lagi pembelaan adalah fraud di pihak plainitif. Tetapi, jika ia berjaya, adalah kurang kemungkinan defendan akan mendapat kembali kosnya (lihat ms 441D–G).]

Notes

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1338–1369.

Cases referred to

Herbert Berry Associates Ltd v Inland Revenue Commissaries [1977] 1 WLR 1437 (refd)

Rahmat Ali v Calcutta National Bank AIR 1955 All 169 (refd)

Legislation referred to

Companies Act 1965 s 226 (3)

CK Leong (*CK Leong & Co*) for the plaintiff.

Steven Thiruneelakandan (*Shook Lin & Bok*) for the defendant.

Abdul Hamid Mohamad J: This action commenced in 1989. There is a related action in Ipoh High Court involving the same subject matter, though a different defendant. The trial of the Ipoh High Court case, which I understand is very lengthy, has almost come to a close. Indeed, considering that the two cases involve the same facts concerning an incident in Ipoh, this case should have been transferred to Ipoh and heard together with the Ipoh case.

In this action claim is an insurance claim in the sum of RM32,249,000 'or alternatively' RM16,124,500 interest and costs arising from damage and loss by fire.

The defendant, inter alia, pleaded fraud.

By a summons in chambers, the defendant has applied for the plaintiff to provide security for costs in the sum of RM200,000 on the ground that the plaintiff has been wound up. The senior assistant registrar dismissed the application. I allowed it but fix the amount at RM100,000. Hence this appeal.

Before me only one issue was argued. That is whether the defendant must obtain leave of court first before filing the application. This is in view of the provision of s 226 (3) of the Companies Act 1965. There was a similar application in the Ipoh case. Gill J had decided that leave must be obtained

first. The appeal to the Court of Appeal is still pending. I have the advantage of reading Gill J's judgment. So, it was with great reluctance and respect that I decided otherwise. Indeed I hope that both appeals will be heard together.

Section 226(3) of the Companies Act 1965 provides:

> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
>
> (a) By leave of the Court; and (b)in accordance with such terms as the Court imposes.

Gill J in coming to the conclusion that he did on the interpretation of that provision said:

> In respect of the issue of leave pursuant to s 226(3) Companies Act 1965, it is my view that it is a statutory bar intended to protect the interest of the creditors of the company in liquidation, by preventing the company being subjected to actions, once it has gone into liquidation, without the court first considering, whether such an action ought to be allowed.
>
> I am unable to accept the contention of Mr Porres that an application for security for costs is not a proceeding for the purpose of s 226(3) Companies Act 1965. To my mind, during the course of pre-trial proceedings, a party may need to make a number of applications to the court. The type, and numerousness, of these applications depends on the circumstances of the case. These applications, regardless of their nature, come well within the province of proceedings. According to *Stroud's Judicial Dictionary* (4th Ed) 'proceedings' is said to denote steps in the action. *Smalley v Robey & Co* [1962] 1 QB 577. 'Action or proceedings' according to the Married Women's Property Act 1893 meant, in the latter word 'a proceeding in the nature of an action' (per Davey LJ, *HoodBarrs v Cathcart* [1894] 3 Ch 376). Judging from Stroud's definition, to my mind the present application falls within the realm of 'proceedings', as it is a step in an action. Looking at the general ethos of s 226(3) Companies Act 1965, viz a viz protection of creditors of a company in liquidation, leave of the court should be asked for, and obtained before an application for security for costs is initiated, as the consequences of this application, if granted, does undoubtedly have an effect on the creditors of the company in liquidation.
>
> It may be pertinent at this juncture to reproduce a caption of the judgment of his Lordship Lord Blanesburgh in the Privy Council case of *Lloyd-Owen v Bull* (1936) 1 DLR 433:
>
> > 'A judge in winding-up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding-up. In authorizing proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success; where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.'
>
> As such, I am firmly of the view that the procedure is that the defendant should have first obtained leave of the winding-up court before proceeding

A against the plaintiff, in respect of this application for security for costs, and not, as was done here, proceed independently. As advised in the Privy Council case of *Lloyd Owen v Bull* cited above, the defendant has to obtain authority from a judge in the winding-up court who will act liberally, but must satisfy himself as to the probable success of this application and the defendant has to give an assurance to the sanctioning judge that his action is not vexatious or B merely oppressive.

On my part, I prefer the view expressed in *Herbert Berry Associates Ltd v Inland Revenue Commissaries* [1977] 1 WLR 1437 (HL) and *Rahmat Ali v Calcutta National Bank* AIR 1955 All 169, a decision of the full bench.

In *Herbert Berry*, the appellant company was indebted to the C respondent. The respondent levied distress on the company's goods. The appellant company went into a creditor's voluntary liquidation. By agreement, the detained goods were sold by the liquidator on terms that the respondent retained against the proceeds of sale such rights as they had against the goods themselves. By an originating summons the liquidator sought an order that all further proceedings on the distress be stayed and a D declaration that the property was property of the company available for distribution by him amongst the company's creditors in accordance with the provisions of the Companies Act 1948. Templeman J dismissed the summons and the Court of Appeal dismissed the appeal by the liquidator. The House of Lords also dismissed further appeal. The grounds do not concern us here. We are only concerned with the meaning of the words E 'action' and 'proceeding' in s 226 of the Companies Act 1948 (England) that are in pari materia with provision under consideration. Lord Simon of Glaisdale said at p 1446 of the report:

> The Companies Act 1948 in a statute dealing with technical matters, and one would expect the words therein to be used in their primary sense as terms of F legal art. The primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of a court by writ, 'proceeding' the invocation of the jurisdiction of a court by process other than writ. Furthermore 'action or proceeding' in s 226(b) must presumably have the same meaning as the same words in s 226(a), where they undoubtedly refer to the invocation of the jurisdiction of the court.

G In *Rahmat Ali* AIR 1955 All 169, Malik CJ said:

> (17) Whenever a matter comes up before a court and an objection is taken, that leave under s 171, Companies Act had not been obtained, the court has to decide whether it is a suit or other legal proceeding against the company. If the words 'against the company' merely mean that the H company is arrayed as the opposite party, as was held by Braund J, permission of the company judge would be necessary whenever any legal proceeding has to be instituted or continued against the company. That this could not be the meaning is obvious from the fact that where the company has come to court and has instituted the proceeding, which it can do without the leave of the company judge, the defendant will be required to take his permission to institute or continue any legal I proceeding to defend himself. To hold that would put the defendant in a difficult position and it would be necessary, before he can take any proceeding against the company even by way of defence or to disprove the

company's claim or to get some order passed in favour of the company vacated, to take the permission of the company judge.

The words 'against the company' must mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. It would probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case the question, whether the claim was put forward or the suit was filed by the company before or after the winding-up order, should make no difference.

(18) In (1901) 85 LT 141 (J), Lord Davey said:

> 'It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in that action to obtain leave for any defensive proceeding on their part.'

Braund J distinguished these observations and confined them to a case where the action had been taken by the company and proceeded with after the winding-up order. As Lord Davey was merely stating the facts of the case before him, he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding-up order, his decision would have been the other way.

(19) This appears to us to be also just and proper as in such a case it is the company which wants to fasten the liability while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability. Liquidation proceedings under the Companies Act are for making available the assets of the company in 'pari passu' satisfaction of its liabilities, and if persons, other than secured creditors, are allowed to enforce their claims without any control exercised by the company judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after the winding-up order, no permission of the company judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

If, however, the proceedings in a court of law are started by a person other the company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into court by the company itself, the permission of the company judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the company owes to him a certain sum of money or that he does not owe the company any sum of money, the permission of the company judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the

A defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an 'ex parte' decree or order should not require the permission of the company judge.

If the proceeding has been instituted or continued on behalf of the company after the winding-up order, according to the view taken by B Braund J the subsequent proceedings by way of defence would come under the rule laid down by Lord Davey. There does not appear to us, with great respect to the learned Judge, to be any good reason for coming to the conclusion that the result should be otherwise where the proceedings had been instituted and continued by the company before the winding-up order, specially as under s 171, Companies Act the C company is not required to obtain the permission of the company judge for the institution or the continuance of a legal proceeding.

(20) In our view, therefore, in a case like the present, where the company has obtained a decree, an application to have that decree reviewed by reason of some error apparent on the face of the record is not a legal proceeding coming against the company within the meaning of s 171, Companies Act D and no leave of the company judge was necessary.

As I said earlier, I prefer the view expressed in these two cases. What the section seeks to do is to prevent a party commencing or proceeding an originating process against the company after it has been wound up or provisional liquidator has been appointed, without leave of the court. It is E not to prevent a party from defending itself in a suit brought by the company against it. A defendant making an interlocutory application in the process of defending itself should and does not become a plaintiff or the initiator of the suit. To say otherwise, would be unfair to the defendant. Whereas the company may without leave of the court file all kinds of interlocutory applications against the defendant, the defendant is prevented from doing F the same. I see no reason why the defendant who has been dragged to court by the company should be placed in a worst position than the company. The defendant, in defending itself, surely incurs costs, which in this case, will certainly be quite substantive, what more when the defence is fraud on the part of the plaintiff. Yet, if it succeeds it is very unlikely that the defendant will ever recover its costs.

G For these reasons, I allowed the appeal with costs and ordered the plaintiff to furnish a security of RM100,000.

Appeal allowed.

H Reported by Jafisah Jaafar

I